IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1897.

GEORGE W. HARRISON,
Appellant,
vs.
PEDRO PEREA, et al.,
Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

This was a suit in equity, brought in the District Court of Bernalillo County, New Mexico, by Pedro Perea as sole surviving administrator of the estate of Jose Leandro Perea, Second, and also as one of the heirs-at-law of the deceased who, at the time of his death, was an infant less than eight years of age. Jose Leandro Perea, referred to in this brief as the elder Perea, married, in 1842, one Maria Dolores Longina Chavez, by whom he had twelve children, all of whom survived him. She died in 1877, and in 1878 he married Guadalupe Perea, by whom he had two children, Julian and Jose Leandro, Second. Julian died before the death of Jose Leandro, Second, and is not

mentioned in the findings of the Supreme Court of the Territory, nor is the matter of his death at all material to this controversy, because, as the law was at the time of his death, his mother inherited his entire estate. He is not mentioned in the pleadings except in the cross-bill, to which reference will be made, and is mentioned there only for the purpose of alleging that the administrators of the elder Perea did not deliver to his mother as his sole heir-at-law all that was coming to him from the estate of his father. Guadalupe Perea died on the 20th day of October, 1889. On the 6th day of January, 1890, the appellant was appointed her administrator. This bill of complaint was filed on the third day of April, 1890. The material facts, as alleged therein, are substantially as follows:

On the 23d of July, 1884, Guadalupe Perea became the guardian of the property of Jose Leandro Perea, Second, and took possession of his property, alleged to be worth thirty thousand dollars. Later, she married the appellant, George W. Harrison (the time of the marriage not being stated, but it is found by the Supreme Court to have been the 2d day of September, 1885). During the life of the child, under the influence and direction of appellant and acting through him, she made false reports to the Probate Court as to the condition of the estate of the child, and after his death she made what she designated a final report as guardian of the child. It is alleged that this report was false and that the same was not filed until March 6th, 1888, although the child died on the 27th day of August, 1887, and said Guadalupe and complainant had been appointed administrators of the estate of the child in September, 1887, and the complainant had qualified October 1st and the said Guadalupe on the 9th day of October of that year. This report was false in that it charged the said Guadalupe with less

than she ought properly to have been charged with, and claimed credits to which she was not entitled. On November 7th, 1887, a little more than two months after the death of the child, she filed, through the appellant, a report in the Probate Court showing that she had then in her possession assets of said estate amounting to $25,190.20 together with 8.000 pounds of wool and $71.42 in stock of the Bernalillo Bridge Company, while the report filed only four months later showed a balance of only $17,670.61. During the life of his wife appellant came into possession of the assets of the estate of the deceased minor amounting to thirty thousand dollars. After her death he continued to hold them and refused to deliver them to complainant on the pretense that the accounts of his wife as guardian had not been settled, although several months intervened between the death of his wife and his appointment as her administratrix, during which time there was not even a pretense that he had any color of right to the possession of these assets. The bill set out with unnecessary particularity wherein the reports of said Guadalupe as guardian, made by the appellant, were false, and also charged specifically the wrongful acts of the appellant, and, without going further into tedious detail, it is sufficient to say that the bill sought to charge the appellant, as a trustee *ex maleficio* or as administratrix of his deceased wife, in whichever capacity it might turn out, upon the evidence that he held the fund, and to have a distribution of the fund to the persons entitled thereto. It also sought to charge the appellant individually with the costs of the proceeding including the solicitor's fees, and with the interest or accretions of the fund. The bill made Grover William Harrison, an infant son of the appellant and his deceased wife, a party, presumably because he, through the death of his mother, inherited three-fourths of her share of the estate.

Appellant demurred to this bill on the following grounds:

First. Because complainant has sued in two capacities, individually, and as surviving administrator of Jose L. Perea. Second, and the bringing of the suit in such double capacity, constitutes a misjoinder of parties complainant.

Second. Because said bill seeks to surcharge and falsify the accounts, statements and reports filed by Guadalupe Perea de Harrison, deceased, of whose estate, defendant, George W. Harrison, is administrator, as guardian of Jose L. Perea, Second, to-wit, the account, statement and reports alleged to have been filed by her respectively on the 6th day of July, A. D. 1886, and on the 7th day of November, A. D. 1887, and on the 6th day of March, A. D. 1888, and does not definitely and with sufficient certainty allege wherein and in what particulars said guardian failed in said reports, statement and accounts to properly charge herself with items, and wrongfully took credit for items, to which credit shows she was not entitled.

Third. Because said defendant, George W. Harrison, is made a party defendant to said bill in his individual capacity, when said bill contains no allegations, which, if true, would make him liable in such capacity.

Fourth. Because the District Court as a court of equity has no original jurisdiction to entertain a bill for the settlement of guardian's accounts.

Fifth. Because the District Court as a court of equity has no original jurisdiction to entertain a bill for the settlement of administrator's accounts.

Sixth. Because complainant has a full, complete and adequate remedy in the Probate Court.

Seventh. Because complainant has a full, complete and adequate remedy in a court of law.

Eighth. Because complainant is not entitled to the relief prayed for, and to his attorney and counsel fees.

Ninth. Because said bill prays both for the settlement of the guardianship of Guadalupe Perea de Harrison, and also of the estate of the deceased ward,

Jose L. Perea, Second, and is therefore multifarious.

Tenth. Because said complainant as the co-administrator of defendant's intestate seeks by said bill to administer the estate of Jose L. Perea, Second, alone, and to the exclusion of defendant, who is entitled to participate in such administration as the administrator of complainant's co-administrator.

Transcript of Record, Folios 30-31.

This demurrer was withdrawn and an answer was filed wherein the defendant in effect admitted all that the bill charged as to the receipt by him of the assets, but alleges that his refusal was not for the reasons alleged in the bill "but that there might be a full and just accounting as to the said estate and for no other reason." The answer, however, strenuously claimed that until there was a settlement of the accounts of the guardianship, the complainant had no right to the possession of the assets, but appellant was lawfully entitled to hold the same until such settlement. Special attention is called to the following extracts from the answer:

"That he admits that heretofore, to-wit, on the 27th day of August, 1897, Jose L. Perea, Second, a minor, about the age of eight years, died at said County of Bernalillo, leaving the said Guadalupe Perea de Harrison, his mother, then living, his heir-at-law, but the said defendant does not admit that the said complainant and the other defendants mentioned in said bill, to-wit, Jose L. Perea, Jesus M. Perea, Benicio F. Perea, Mariano Perea, Jacobo Perea, Beatriz Perea de Armijo, Soledad Perea de Castillo, Filomena Perea de Otero, Barbara Perea de Yrisarri, Cesaria Perea de Hubbell and Grover William Harrison were and are the heirs-at-law of the said deceased; but said defendant alleges that it is a question of law, whether or not said persons are such heirs at law, and he neither admits nor denies the fact, but leaves the decision of the same to the court."

Transcript, Folio 34.

"Further answering, the said defendant admits that the effects of the Jose L. Perea, Second, which went into the hands of his guardian, *was* personal property, money, promissory notes, bank stock, as alleged in complainant's bill, but defendant denies that the same were in value or amount the sum of thirty thousand dollars."

Transcript, Folio 35.

"Further answering, this defendant denies that it was through his influence that said Guadalupe Perea de Harrison pretended and claimed that after the death of her said ward and the qualification of said complainant and said guardian as administratrix of his estate, she still held the property and effects of said deceased minor in her late capacity of guardian, *and the defendant alleges that the said Guadalupe Perea de Harrison was advised by counsel that after the death of her said ward her guardianship would not be terminated until she made a final report as such guardian and until the said report had been approved, and that it was necessary that such final report should be made and approved, and she by order of court finally discharged as such guardian. And defendant further states that he is so advised by counsel himself, and alleges that such is the fact and that the law so requires.*"

Transcript, Folio 37.

"Further answering, defendant admits that the said Guadalupe Perea de Harrison continued, prior to the 6th day of March, A. D. 1888, to insist that she still held the property and effects of the said minor, which were in her hands as guardian, and refused to permit the said complainant to intermeddle therewith, until she could make a final report as guardian and procure a final discharge as such, all of which this defendant alleges she did under advice of counsel and as she had a right to do."

Transcript, Folio 38.

"And further answering, this defendant denies that the complainant is en itled to the possession of said estate until the said guardianship accounts have been fully settled."

Transcript, Folio 41.

"Defendant alleges that he did not refuse to turn over said guardianship estate to said complainant for the reasons alleged in said bill, but that there might be a full and just accounting as to the said estate, and for no other reason.

"Further answering, defendant admits that Guadalupe Perea de Harrison died intestate, in October, 1889, and that this defendant was appointed, qualified, and is now the administrator of her estate; and that he holds possession of said guardianship estate lawfully as such administrator of the estate of his deceased wife, because her guardianship has never been settled, although she in good faith endeavored to procure a settlement thereof, as hereinbefore alleged. Said defendant denies that prior to his becoming such administrator that he unlawfully took possession of said guardianship estate.

"Further answering, this defendant alleges that he is entitled to have a legal settlement of said guardianship estate, either by said appeal or by the Probate Court, or this honorable court, prior to turning over said estate to the complainant, or anybody else; that what the complainant is entitled to is an accounting as to said guardianship, and which accounting this defendant stands ready, willing and anxious to have, as the administrator of the said Guadalupe Perea de Harrison."

Transcript, Folio 42.

"And this defendant further alleges that he and the said defendant, Grover William Harrison, the minor son of himself and the said Guadalupe Perea de

Harrison, have succeeded to all the interests and rights of the said Guadalupe Perea de Harrison in and to the assets of the said estate.

"Wherefore, by reason of the premises, this defendant alleges that said complainant will not be entitled to a decree for anything upon said accounting, but defendant alleges that he is ready and willing to pay any sum for which he or the estate of the said Guadalupe Perea de Harrison may be found liable on said accounting."

Transcript, Folio 45.

In addition to the parts of the answer quoted, the appellant set up in his answer the matters set forth in his first assignment of error, all of which latter allegations were expunged on exceptions. In view of the fact that these allegations are set forth in appellant's first assignment of error in convenient form for consideration by the court, it would not be proper to enlarge this statement by repeating them here; but it is submitted that they are wholly immaterial to this controversy, and constitute no defense to the relief prayed for by this bill.

Appellant also filed a cross-bill in which he sought to charge the appellee as one of the administrators of his deceased father with misfeasance, malfeasance and nonfeasance, and to surcharge and falsify the accounts of the said administrators, to have them removed, to set aside a final settlement of their accounts approved by the Probate Court in 1886, and then to have an accounting of the estate of the elder Perea which should begin at his first marriage in 1842, in order to ascertain what portion of the assets of which he died possessed was acquest or community property of the second marriage. It may be well to state that the elder Perea left a will whereby he disposed of all the property in his possession at the time of his death, whether

such property was acquired during the existence of the marriage between him and the said Guadalupe or not and whether the said property was his separate property or not; and the said appellant by his cross-bill seeks to sustain the said bill and to claim all which by the will was devised to the said Guadalupe, and also to attack the will as ineffectual to dispose of her share of the community property. The cross-bill affirmatively shows that there was another action pending in the same court for the same cause, and if resort may be had to the prayer of the cross-bill, that shows that it was multifarious and was not germane to the matters alleged in the original bill. The cross-bill was demurred to and the demurrer sustained.

The case was heard by a master whose findings are not now material. The trial court rendered a decree against appellant, and the case was taken on appeal to the Supreme Court of the Territory. That court affirmed the decree of the court below with modifications, and the case is now here upon a transcript and assignment of errors, evidently made up on the theory that the case is here for review in the same manner and to the same extent as it was before the Supreme Court of the Territory.

Counsel for appellant discusses the case in his brief as if it were here for review upon the facts as well as upon the law. But this brief will be confined to the discussion of such matters as may properly be considered by this court upon this appeal.

Appellee asks this court to award damages against the appellant as for a vexatious appeal, and in support of this claim he begs to call the attention of the court to the fact, as shown by the record, that appellant in his pleadings in the trial court relied strenuously, and indeed entirely, after the exceptions to his answer were sustained, upon the proposition that he could not be compelled to surrender the assets of this child to

his surviving administrator until the guardianship accounts of his deceased wife were settled, and this claim he continued to assert for years after the death of his wife, but now abandons. In the brief filed on his behalf in this court, it is said:

"The complainant contended in the court below, and the master found, that upon the appointment of Guadalupe Perea de Harrison as administratrix of her deceased son, she ceased, by operation of law, to hold such assets belonging to his estate as were then in her hands as guardian, and thereafter held them as administratrix. Appellant is disposed to concede this proposition."

Of the assignments of error relied on, at least eighteen attempt to present matters not open to review in this court; and of the remaining eight, at least four are clearly frivolous, and the other four do not present questions upon which appellant was justified in asking a review by this court, as no probable cause for reversal is shown to exist.

The Supreme Court of New Mexico found that the appellant's conduct with reference to this fund was in the highest degree inequitable, and the whole record shows that the appeal was taken for delay merely. Under these circumstances, it is submitted that damages should be awarded.

I.

The exceptions to the answer of Appellant were properly sustained.

There is nothing in the transcript on file which shows what part or parts of the answer of the appellant were excepted to in the trial court, but appellant attempts by his assignments of error to correct this defect in his transcript, alleging in the first assignment that which the transcript fails to show, i. e., the par-

ticular allegations of the answer which were stricken out on exceptions. It is not intended to dispute the correctness of the statement of counsel, in his assignment of error, as to the portions of the answer which were in fact expunged on the exceptions sustained by the trial court.

It is impossible, however, to concede the proposition laid down in the brief of counsel, that, if it does not plainly appear what was stricken out on these exceptions, the court committed error in sustaining them. It did, of course, plainly appear to the trial court what part of the answer was excepted to, and it must have also plainly appeared to the Supreme Court of New Mexico, or it could not have pointed out in its opinion, as claimed by appellant's counsel, the parts of the answer so striken out; but does it plainly appear to this court? The opinion of the court below is no part of the record here, so this court must look to the first assignment of error in order to determine what part of the answer was stricken out on these exceptions. If this court is willing to review the action of the lower courts in this regard, the appellee has no objection to offer, but he does insist that the action of those courts must be presumed to be correct, and should not be overturned unless error is made to appear affirmatively. If this action of the courts below can be considered, it is clear that theirs was no error in sustaining these exceptions to the defendant's answer for the following reasons:

(*a*) The suit was brought to ascertain what amount of money, belonging to the estate of the deceased child, had come to the hands of Guadalupe Perea de Harrison and her husband, the appellant, and to obtain distribution of that money. That there might be further moneys due the estate of the infant from the estate of his deceased father was no obstacle to the distribution

of the moneys actually ready for distribution.

(*b*) The appellant had no right to withhold moneys, to the custody of which appellee, as surviving administrator of the decedent, was entitled, on the pretense that appellee as administrator of another estate had failed to do his duty.

(*c*) It appeared by the allegations of the answer and by the allegations of the cross-bill that there was another action pending in the same court, in which all parties necessary to a determination of the entire controversy were before the court; in which the appellant, Harrison, was seeking to surcharge and falsify the accounts of the administrators of the estate of Jose Leandro Perea, the elder, and in which all of the matters sought to be set up by way of defense to this suit were made the foundation of a demand for affirmative relief against the administrators of the said Jose Leandro Perea, of whom appellee was one.

(*d*) The portions of the answer stricken out on exceptions by the trial court, do not, when read as a whole, nor do any of the allegations contained therein, state any fact material to a determination of the matters alleged in the bill of complaint in this cause, nor does the decree in this case conclude the appellant as to any of those matters. He is still free to proceed, in the suit brought against the administrators of Jose Leandro Perea, the elder, to demonstrate, if he can, that that estate has not been fully and fairly settled and to compel a full accounting by those administrators notwithstanding this decree.

(*e*) It affirmatively appears by the allegations of the answer and of the cross-bill that the estate of the elder Perea had been settled, and the settlement thereof had been approved by the probate court on the 11th day of December, 1886, and appellant by this answer and cross-bill sought to impeach that settlement.

Unless the matters set up in an answer are responsive to the allegations of the bill, or tend to show that the complainant is not entitled to some

part of the relief sought by the bill, such matters are impertinent, and are properly expunged on exceptions. The rule on this subject is well stated by the supreme court of Maine, as follows:

It has often been declared by the courts that the best rule to ascertain whether the matter excepted to be impertinent is to see whether the subject of allegation could be put in issue or be given in evidence between the parties. An application of this test here clearly shows that the ruling of the presiding judge must be sustained.

The bill seeks to obtain from the respondents an account and settlement of the earnings of a vessel, owned by the parties to the bill as tenants in common. Two of the respondents in their answers virtually admit the principal facts alleged in the bill, but set up the statute of limitations as a defense thereto. This, of course, is proper enough. But they then go further, and, by way of excuse or justification for setting up such a plea, assert that the complainant is indebted to them, respectively, in certain other accounts which have no connection whatever with the transactions set forth in the bill. This was unnecessary and improper. It introduces matters which cannot be put at issue, and about which evidence cannot be received. It would only excite prejudice or feeling, and tend to unnecessary discussion and delay. The rule which disallows impertinent allegations is a sound and just one, and whenever required should be enforced.

Spaulding vs. Farwell, 62 Me., 320.

In the case of Wood vs. Mann, Mr. Justice Story, delivering the opinion of the court, said:

The remaining question is, whether the exception can be properly taken in this form upon a reference to the master, and a report for impertinence. It does not strike me that this point is of any serious importance; for if the court should be satisfied that the matter was not proper for an answer, and involved inquiries not in that stage of the case open to litigation,

I have no doubt that it would be the duty of the court, as a matter of self-protection, to suppress it. It is a great mistake to suppose that, if the parties do not object to a matter, the court is bound to entertain cognizance of it and to decide it. But is this matter of impertinence or not? It is argued that it is not, because it does not answer the description given by Gilbert in his Forum Romanum (page 209), where he says that "impertinences are where the records of the court are stuffed with long recitals, or with long digressions of matters of fact which are altogether unnecessary and totally immaterial to the point in question," and he then proceeds to illustrate it by instances. Doubtless such matters as he states are impertinences. But they are not the only matters of this sort, even if the generality of the expression in the latter part of the sentence, as to immaterial facts, would not (as I am not prepared to admit) cover the present case. Impertinences are, as I conceive, any matters not pertinent or relevant to the points which, in the particular stage of the proceedings in which the cause then is, can properly come before the court for decision. If the cause is at issue upon a general answer purporting to be to the merits, any matter not going to the merits is properly to be deemed an impertinence."

Wood vs. Mann, 1 Sumner, 578.

It is said by counsel for appellant, in his brief :

The exceptions filed to the answer for impertinence, necessarily admit the truth of the allegations to which they are filed.

While it is true that the allegations of the answer are to be taken as true, in determing the exceptions, the rule is confined to such allegations as as are well pleaded, and does not extend to allegations of mere legal conclusions such as the following:

And that the said complainant, Pedro Perea, is liable and responsible to the estate of said minor, Jose L. Perea, Second, for any and all of the interest of the said minor in the estate of the said Jose Leandro

Perea, Sr., which said complainant and his co-administrators have failed to account for.

The learned counsel for appellant argues these exceptions, in his brief, as if the portions of the answer stricken out contained only allegations of material facts, although an inspection of the record will show that much of the matter stricken out was made up of merely erroneous legal conclusions, unsupported by allegations of fact and the answer read as a whole, will demonstrate that the parts which were excepted to, contained no allegation of a material fact "or matter which could have any influnce in the decision of the suit, either as to the subject-matter of the controversy, the particular relief to be given, or as to the costs."

Story Eq. Pl., Sec. 863.

1 Beach Mod. Eq. Pr., Sections 408--412.

Hood vs. Inman, 4 John. Ch. 437.

Powell vs. Kane, 5 Paige Ch. 267.

Spaulding vs. Farwell, 62 Me. 320.

Wood v. Mann, 1 Sumn. 578.

Woods v. Morrell, 1 John. Ch. 105.

Florida Mortgage Co. v. Finlayson, 74 Fed. Rep. 674.

II.

The Demurrer to the Cross-Bill Was Properly Sustained.

The cross-bill was filed by appellant in his individual capacity and as administrator of the estate of Guadalupe Perea de Harrison, deceased. By it he sought to impeach the settlement of the estate of the elder Perea which had been approved by the probate court in December, 1886, almost eight months before

the death of the child whose estate ought to have been ready for distribution within a very short period after his death. He also seems to call in question the distribution of the estate of Maria Dolores Longina Chaves, the first wife of the elder Perea, who died in 1877, and he claims that the administrators of the estate of the elder Perea had administered upon and distributed property which properly belonged to Guadalupe Perea de Harrison as her share of the community property of the marriage community of herself and the elder Perea. He alleged that there was already pending, in the same court, another action, with all necessary parties before the court, in which the same matters alleged in the cross-bill were set up; indeed, the cross-bill is declared in terms, to be a repetition of the original bill in the other case. He sought to bring into this litigation the administrators of the estate of the elder Perea, who are not, in their representative capacity, parties to the original bill, and to have them removed as such administrators, a receiver of that estate appointed in their stead, and to have a decree declaring void the final settlement of those administrators as approved by the probate court. After this he desired a new accounting which should begin at the time of the first marriage of the elder Perea in 1842.

The cross-bill was demurred to upon the following grounds:

First: That the matters and things in said cross-bill alleged and set forth, and in and about which relief is prayed in and by said cross-bill, are in nowise connected with the matters and things in the original bill in said cause and the relief prayed for therein.

Second: That the relief prayed for in and by said original bill is of matters relating solely and entirely to the estate of Jose L. Perea, Second, deceased,

and that prayed for by said cross-bill is of matters relating to another and distinct estate, with which the said Pedro Perea, as administrator of the estate of Jose L. Perea, Second, deceased, has no interest or concern.

Third: That it appears ln and by said cross-bill that it is sought thereby to consolidate two separate distinct suits now pending in this honorable court, which are in no way or manner connected with each other, and in which the parties are not the same.

Fourth: That relief is sought in and by said cross-bill against Pedro Perea and Mariano Perea, as administrators of one Jose L. Perea, deceased, who, as such administrators, are neither parties complainant nor defendnnt in said original bill.

Fifth: That the said cross-bill relates to matters between parties other than complainant as administrator of the estate of Jose L. Perea, Second, deceased, and said complainant should not be embarrassed thereby, or this record encumbered by this cross-bill.

Sixth: That said cross-bill is multifarious.

Seventh: That said eross-bill is without equity.

Eighth: That said cross-bill is in many other respects informal, insufficient and defective.

This demurrer was properly sustained by the court: the matters alleged in the cross-bill are not germane to the original bill; the cross-bill is multifarious; it attempts to bring in new parties, and its only effect, and it is not unfair to say that its on'y purpose, was to embarrass and delay the adjudication and settlement of the estate of this infant which was then ready for distribution. It was not at all necessary to bring into this litigation the matters alleged in the cross-bill, nor is any party in interest precluded by the decree in this cause, from having the relief sought in the other suit if the facts would warrant it. Numerous decisions of this and other courts, state and federal, support the ruling of the court below on this demurrer.

The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and complete determination of all controversies which arise out of the matters charged in the original bill. The fact that the cross-bill fairly tends to accomplish either of these purposes, is generally a sufficient ground for its interposition. It must seek equitable relief, but, subject to this qualification, a complainant who has brought a defendant into a court of equity in order to subject him to an adjudication of his rights in a certain subject-matter, cannot be heard to say that there is no equity in a cross-bill which seeks an adjudication of all the rights of the parties to the original bill in the same subject-matter. The issues raised by the cross-bill must be so closely connected with the cause of action in the original bill that the cross-suit is a mere auxiliary or dependency upon the original suit, but, subject to this qualification, new facts and new issues may properly be presented by a cross-bill.

Per Sanborn, J. in *Springfield Milling Company v. Barnard & Leas Mfg. Co., 81 Fed. Rep. 63.*

A cross-bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between co-defendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill.

Per Sanborn, J. in *Stuart v. Hayden, 72 Fed., 410.*

Story Eq. Pl., Sec. 389, 398, 399.

1 Beach Modern Eq. Pr., Sections 433, 435.

Fidelity Trust & S. V. Co. v. Mobile St. Ry., 53 Fed. 850.

McMullen v. Ritchie, 57 Fed. 104.

Richman v. Donnel. 53 N. J. Eq. 32.

Carnochan v. Christie, 11 Wheat. 446.

Meissner v. Buck, 28 Fed. 161, 163.

R'y Co. v. Bank, 134 U. S. 276.

Davis v. Christian Union, 100 Ill., 313.

French v. Griffin, 18 N. J. Eq. 279.

Gregory v. Pike. 67 Fed. 845.

Graham v. Berryman, 19 N. J. Eq. 29.

Wickliffe v. Clay, 1 Dana, 585, 589.

Allen v. Roll, 25 N. J. Eq. 164.

King v. Insurance Co., 45 Ind. 43.

Ayers v. Carver, 17 How. 594.

Shields v. Barrow, 17 How. 145.

The "Dove," 91 U. S. 385.

Cross v. De Valle, 1 Wall. 5.

Johnson Co. v. Union Co., 43 Fed. 331.

Rubber Co. v. Goodyear, 9 Wall. 807.

Stonemetz Co. v. Brown Co., 46 Fed. 851.

Young v. Colt, 2 Blatch. 373.

Cunningham v. Erwin, Hopk. Ch. 66.

Kruger v. Ferry, 41 N. J. Eq. 432.

Draper v. Gordon, 4 Sanf. Ch. 210.

III.

If the appellant's theory of the case had any foundation, he should have moved the court to consolidate the two causes—the one seeking the settlement of the estate of the elder Perea and the case at bar.

This record discloses the fact that at the time the appellant filed his answer and cross-bill there was pending in the same court another suit to which the administrators and all of the heirs-at-law of the elder Perea were parties, and in which he sought, as complainant, to reopen the settlement of that estate as made by the probate court in December, 1886. If there was any necessary connection between these two suits, the appellant might, by a motion to consolidate, have placed the trial court in position to exercise its discretion upon the motion and to impose terms upon the appellant as a condition to the granting of his application. Such conditions certainly would have involved the payment into court and distribution by interlocutory decree of at least twenty-five thousand dollars of money in the hands of appellant, as to which there was no ground for controversy. Upon an application to consolidate, the court, in its discretion, could have prescribed such terms, and if the application appeared to be made in good faith, to obtain a fair settlement of both estates, would undoubtedly have done so. If, on the other hand, it appeared to the court that the appellant was merely endeavoring to obstruct the progress of this case, was struggling for mere delay, and was seeking inequitably to prevent the distribution of the estate of this child, it would certainly have refused to lend its aid to the accomplishment of such a purpose and would have denied the application. The action of the court upon such an

application would not be subject to review upon appeal, as it is purely a matter of discretion, and consolidation of causes is only allowed to prevent unnecessary costs or delay.

This court has said in cases at law (*Insurance Co. vs. Hillman, 145 U. S. 293*): "The learning and research of counsel have produced no instance in this country in which such an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exceptions or writ of error."

The power of a court of equity to consolidate causes is certainly equal to that of a court of law, and it has been said that "equity will interfere to restrain the prosecution of separate actions and to have the rights of the parties determined in a single suit, when convenience and the ends of justice will be subserved by an investigation and determination of the whole controversy in a single suit."

The effect of the filing of the cross-bill, and injecting into the answer the matters excepted to, if the exceptions and demurrer had been overruled, would have been to work a virtual consolidation of these two causes, for it can hardly be contended that the appellant could have gone on with his original suit and at the same time have prosecuted his cross-bill in this suit; yet it is contended that the court could exercise no discretion in passing upon the demurrer and exceptions. If this proposition is sound, a chancellor may be compelled to consolidate causes, by indirection, where he might refuse a direct application. That the court properly exercised its discretion in preventing the appellant from obstructing the progress of this suit is demonstrated by the result. The supreme court of New Mexico found:

> That immediately after the intermarriage of the defendant, George W. Harrison, and the said

> Guadalupe Perea, the said George W. Harrison took charge and control of the affairs of the said Guadalupe Perea, including the assets of the said minor, Jose L. Perea; that he reduced the assets and property of said minor to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of final decree in the case in the district court he retained, subject to his individual control, all of the moneys belonging to the estate of Jose Leandro Perea, Segundo.

This finding, fairly construed, shows that the estate of the deceased child had been reduced to money and placed in bank, subject to the individual control of the appellant, at the time of the death of the child on the 25th day of August, 1887, and it was just eight years and one day thereafter that the decree of distribution was entered in that court. It is now more than ten years since the death of the child, and the money is still in possession of appellant.

One shudders to think what length of time would would be required for the unraveling of the estate of the elder Perea, with a million dollars of assets, and two marriage partnerships to be investigated, and the community property in each to be ascertained and segregated, if more than ten years are required to compel this appellant to let go his hold of the estate of this child, ready for distribution as it was at the time of the child's death. Appellant's cross-bill alleges that there was another action pending in the same court for this same cause, and this was properly considered on the demurrer. It is also true that appellant might, even after the exceptions and demurrer were sustained, have made the motion to consolidate the two causes. Not having done so, this court will certainly not reverse this case, unless it very clearly appears that the appellant has been prejudiced by the action of the trial court.

Story Eq. Pl., secs. 736-7.

1 Beach Mod. Eq Pr., secs. 581-5.

Evans vs. Evans, 23 N. J. Eq. 180.

Davis vs. R. R. Co., 25 Fed. 786.

Deering vs. Winona Works, 24 Fed. 90.

Mercantile Trust Co. vs. Ry. Co., 41 Fed. 8.

Biron vs. Edwards, 77 Wis. 477.

Anderson vs. Spear, 4 Dill. 1.

American Co. vs. Hague, 4 Edw. Ch. 117.

Drye vs. Grundy, 35 S. W. 119.

Lunt vs. Kinne, 75 Fed. 636.

Russel vs. Chicago Trust Bank, 139 Ill. 538.

Crane vs. Larsen, 15 Oreg. 345.

IV.

The assignments of error, numbers four to seventeen, both inclusive, and numbers nineteen, twenty and twenty-two, attempt to present matters that are not open to review by this court.

The transcript is made up in utter disregard of the requirements of the statute under which this case is brought here for review. It contains the evidence taken before the master, the master's report and exceptions thereto, and, indeed, everything which was before the supreme court of the Territory when the case was there reviewed. These assignments of error are evidently based upon the idea that the case is to be reviewed by this court, to the same extent and in the same manner as was done by the territorial supreme court. The findings of fact, certified by the supreme court of the territory, are made

part of this transcript as required by the act of congress, but there are no rulings upon evidence certified up in the manner prescribed by the same act. In the brief of counsel frequent references are made to the evidence, the report of the master and to other matters not before this court and in the brief as well as in several assignments of error, complaint is made that certain findings of fact certified by the supreme court of New Mexico are wholly unsupported by any evidence.

Repeated decisions of this court have settled the practice in such cases as this and under those decisions this transcript should have been made up of the pleadings, the findings of fact and the decree, to which should have been added under section two of rule eight, a copy of the opinion of the court below. Upon such a transcript there would be open for review by this court only the action of the court below in sustaining exceptions to the answer and in sustaining the demurrer to the cross-bill, and the question as to whether the facts found, the findings of fact being conclusive in this court, support the decree.

Grayson v. Lynch, 163 U. S. 473.

Gildersleeve v. N. M. Min. Co., 161 U. S. 573.

Idaho Land Co. v. Bradbury, 132 U. S. 513.

San Pedro Co. v. U. S., 146 U. S. 130.

Mining Co. v. Machine Co., 151 U. S. 450.

Hecht v. Boughton, 105 U. S. 236.

Stringfellow v. Cain, 99 U. S. 610.

Gray v. Howe, 108 U. S. 12.

Zeckendorf v. Johnson, 123 U. S. 617.

Haws v. Victoria Mining Co., 160 U. S. 303.

V.

The decree was properly rendered against the appellant, George W. Harrison, in his individual capacity.

The eighteenth assignment of error is as follows:

The court erred in rendering a decree in this cause against the defendant in his individual capacity, when upon the facts, if he is liable at all, he is liable as administrator of the estate of Guadalupe P. Harrison, deceased.

The supreme court of New Mexico found the following facts, upon which findings the decree against appellant in his individual capacity, is based:

IV.

That the defendant, George W. Harrison, married the said Guadalupe Perea, widow as aforesaid, on the second day of September, 1885.

V.

That immediately after the intermarriage of the defendant, George W. Harrison, and the said Guadalupe Perea the said George W. Harrison took charge and control of the affairs of said Guadalupe Perea, including the assets of said minor, Jose L. Perea; that he reduced the assets and property of said minor to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of final decree in the case in the district court he retained, subject to his individual control, all of the moneys belonging to the estate of Jose Leandro Perea, Segundo.

VIII.

That after the death of the said Jose Leandro Perea, Segundo, until the filing of the bill of com-

plaint in this cause, Guadalupe Perea de Harrison during her lifetime and George W. Harrison after her death claimed to hold the assets of the estate of the said Jose L. Perea, Segundo, not as administrator, upon the pretense that there could be no distribution of such assets until the final account of Guadalupe Perea de Harrison as guardian was settled by the probate court.

IX.

That George W. Harrison (having charge of all the estate of the said ward) in the name of his wife, Guadalupe Perea de Harrison, made sundry reports to the said probate court as to the condition of the estate, some containing false entries to her advantage, and together obstructing distribution among the heirs.

X.

That on the 20th day of October, 1889, Guadalupe Perea de Harrison died, and on the sixth day of J nuary, 1890, George W. Harrison was duly appointed administrator of the said Guadalupe Perea de Harrison, and during all the period between the death of said Guadalupe Perea de Harrison and his appointment as such administrator he was in possession of the assets of the said Jose Leandro Perea, Segundo, deceased, with full power (knowledge) of their trust character, and wrongfully refused to pay over the same to Pedro Perea, who was the sole surviving administrator of Jose Leandro Perea, Segundo, and entitled to the custody thereof.

XII.

That the defendant, George W. Harrison, had in his possession and was liable to the complainant on the day of the rendition of the final decree herein by this court, the sum of thirty-five thousand eight hundred and sixty-nine dollars and seventy-seven cents, which was the total amount of moneys for which he is liable,

as hereinbefore set out, with interest thereon at six per cent. per annum, after allowing all credits to which he or the said Guadalupe Perea de Harrison are entitled.

XV.

That the said Guadalupe Perea de Harrison in her lifetime failed to keep correct accounts of the assets of Jose Leandro Perea Segundo, which came into her possession, and that said George W. Harrison also failed to keep correct accounts of his dealings with the said assets.

XVI.

That George W. Harrison wilfully obstructed the distribution of the assets of the estate of Jose Leandro Perea, Segundo, and by his misconduct rendered it necessary that the complainant should obtain possession of the said assets by the institution of this suit, and that the necessity for this suit arose entirely out of the wrongful conduct of the said George W. Harrison.

If is difficult to understand upon what theory it can be contended that this decree was not properly rendered against Harrison individually, if, as already shown, this court is bound by these findings of fact. The fifth and tenth findings are alone sufficient to support the decree against him.

In the opinion of the supreme court of the Territory it is said:

Complaint is made that the decree in this case was against the defendant personally, and not as administrator. The evidence establishes that for the period of time which elapsed between the death of his wife and defendant's qualification as administrator—nearly three months—defendant was in possession of the assets of the estate, with full knowledge of its trust character, and without the shadow of right to hold them, claiming them for reasons plainly insufficient in

law, and tauntingly asserting his intention to retain them. It is also to be noted that the record does not show that, as administrator of his deceased wife, he ever charged himself with one dollar of these assets, or that they entered into the inventory of her estate, or that they were ever treated by him as a portion of his said wife's estate. It is also shown by his own testimony that he continues in possession of such assets, and that they are deposited in the bank to his credit. Having appropriated them individually, he is estopped to deny his individual liability. We therefore hold that the facts are complete to establish a case for a decree against him as an individual.

Attention is also called to the following allegations in the answer:

And this defendant further alleges that he and the said defendant, Grover William Harrison, the minor son of himself and the said Guadalupe Perea de Harrison, have succeeded to all the interests and rights of the said Guadalupe Perea de Harrison in and to the assets of the said estate.

Wherefore, by reason of the premises, this defendant alleges that said complainant will not be entitled to a decree for anything upon said accounting: but defendant alleges that he is ready and willing to pay any sum for which he or the estate of the said Guadalupe Perea de Harrison may be found liable on said accounting.

Transcript, Folio 45.

1 Perry on Trusts, Sec. 217.

2 Perry on Trusts, Sec. 828.

Mechanics' Bank v. Saton, 1 Peters 309.

Wormley v. Wormley, 8 Wheat. 419.

Oliver v. Platt, 4 How. 333.

McAll v. Harrison, 1 Brock. 126.

U. P. R. R. Co. v. McAlpine, 129 U. S. 305.

Moore v. Crawford, 130 U. S. 122.

Allen v. St. Louis Nat. Bank, 120 U. S. 40.

Easterly v. Barber, 65 N. Y. 259.

Bennet v. Austin, 81 N. Y. 322.

Proprietors, etc., v. Post, 31 Conn. 259.

Hennesy v. Bray, 33 Beav. 96.

Rackhams v. Siddall, 16 Sim. 297.

Wheeler v. Billings, 72 Fed. 315.

Pennington v. Smith, 69 Fed. 189.

Chicago R'y. Co. v. Pullman Co., 50 Fed. 24.

Colt v. Lasnier, 9 Cowen 320.

VI.

It was not at all necessary that the particular dollars which came into Harrison's hands be identified in order to charge him individually.

The twenty-first assignment of error is as follows:

> 21. The court erred in finding and decreeing that defendant was liable as a trustee for funds in his hands, when neither the evidence nor the court's findings identify or show any particular assets in his hands to have been assets of said minor's estate, and the bill itself was not brought for the purpose of impressing a trust on any particular property on assets or against the defendant as a constructive trustee and contains no allegations upon which such relief can be predicated. The only relief the bill warrants is an accounting against the estate of Guadalupe Perea de Harrison.

This assignment of error seems to me to be based upon a misapprehension of the effect of the decree.

The allegations of the bill and the findings of the court are amply sufficient to charge appellant as a trustee *ex-maleficio*, and the decree so charges him. If other creditors of appellant were struggling with this appellee for preference in the application of a particular fund, appellee would be required to identify the fund in question with reasonable certainty in order to establish his right to a preference, but even in such a case, if the finding was that a certain amount of money to which appellee was entitled, went into a particular depository and was commingled with other funds of appellant, where it still remained, part of a larger sum, a court of equity would disentangle the account and give appellee the portion to which he was entitled, notwithstanding his inability to identify particular dollars; but in such a case as this the necessity for identification does not arise.

Socher's Appeal, 104 Pa. St. 609.

National Bank v. Insurance Co., 104, U. S. 68.

United States v. State Bank, 96 U. S. 36.

Bayne v. United States, 93 U. S. 642.

Phila. Nat. Bank v. Dowd, 38 Fed. 172.

Trull v. Trull, 95 Mass. (13 Allen) 407.

Houghton v. Davenport, 74 Me. 596.

VII.

It is immaterial that the supreme court of New Mexico may have included legal conclusions in its findings of facts.

There appear to be two assignments of error numbered 14, as follows:

14. The said court erred in finding by its VII finding of fact that said assets were not held

by the defendant's intestate, Guadalupe Perea de Harrison, as the administratrix of the said deceased minor, when as a matter of law she held them after said guardian's death and letters of administration had been granted her, not as guardian, but as administratrix. Folio 372, page 229.

14. The court erred in holding by its tenth finding that the refusal of the defendant to pay over the assets belonging to said deceased minor's estate which had been in his intestate's hands, either as guardian or co-administrator of complainant, to him without an accounting or other settlement of said estate, was wrongful as a matter of law.

It is quite difficult to understand what question is sought to be raised by these two assignments, but if it is intended to challenge these findings as not supported by the evidence, they cannot avail appellant. If it is intended to challenge them as conclusions of law, not properly deducible from the facts found, I answer that, as conclusions of law, they are not prejudicial to appellant. They seem to have been inserted by the supreme court of New Mexico, because a cross-appeal had been taken, and are material in that aspect of the case only, as will be hereafter shown.

The appellant was not charged by the decree with any of the consequences of wrong-doing. He was merely required to pay over what was found to be in his hands belonging to other heirs of the deceased child; was allowed to retain seventeen twenty-sixths of the entire estate when, on the findings of fact, he should have been allowed to retain only one-half, the share inherited by his deceased wife, and all costs of the litigation in all courts were charged against the fund.

The eighth finding of fact is as follows:

That after the death of the said Jose Leandro

Perea, Segundo, until the filing of the bill of complaint in this cause, Guadalupe Perea de Harrison during her lifetime, and George W. Harrison, after her death, claimed to hold the assets of the estate of said Jose L. Perea, Segundo, not as administrator, upon the pretense that there could be no distribution of such assets until the final account of Guadalupe Perea de Harrison, as guardian, was settled by the probate court.

This is clearly the finding of an ultimate fact and as such it is supported by the answer of the defendant, as follows:

Further answering, this defendaat denies that it was through his influence that said Guadalupe Perea de Harrison pretended and claimed that after the death of her said ward and the qualifications of said complainant and said guardian as administratrix of his estate, she still held the property and effects of said deceased minor in her late capacity of guardian, and the defendant alleges that the said Guadalupe Perea de Harrison was advised by counsel that after the death of her said ward her guardianship would not be terminated until she made a final report as such guardian and until the said report had been approved, and that it was necessary that such final report should be made and approved, and she by order of the court finally discharged as such guardian. And defendant further states that he is so advised by counsel himself, and alleges that such is the fact and that the law so requires.

Transcript, Folios 36-7.

And further answering, this defendant denies that the complainant is entitled to the possession of said estate until the said guardianship accounts have been fully settled.

Transcript, Folio 41.

Further answering, defendant admits that Guadalupe Perea de Harrison died intestate in October, 1889, and this defendant was appointed,

qualified and is now the administrator of her estate *and that he holds possession of said guardianship estate lawfully as such administrator of his deceased wife because her guardianship has never been settled* although she in good faith endeavored to procure a settlement thereof, as hereinbefore alleged.

Further answering, this defendant alleges that that he is entitled to have a legal settlement of said guardianship estate either by said appeal or by the probate court or this honorable court prior to turning over the said estate to the complainant or anybody else, that what the complainant is entitled to is an accounting as to said guardianship and which accounting this defendant stands ready and willing and anxious to have as the administrator of the said Guadalupe Perea de Harrison.

Transcript, Folio 42.

The tenth finding of fact is a follows:

That on the 20th day of October, 1889, Guadalupe Perea de Harrrson died, and on the sixth day of January, 1890, George W. Harrison was duly appointed administrator of the said Guadalupe Perea de Harrison, and during all of the period between the death of said Guadalupe Perea de Harrison and his appointment as such administrator he was in possesion of the assets of the said Jose Leandro Perea, Segundo, deceased, with full power (knowledge) of their trust character, and *wrongfully refused to pay over the same to Pedro Perea, who was the sole surviving administrator of Jose Leandro Perea, Segundo, and entitled to the custody thereof.*

I suppose that it is intended by the second of these assignments of error to question the italicised part of this finding.

It will not be denied that Pedro Perea was the sole surviving administrator. Was he, as such, entitled to custody of the estate? If he was, the refusal to pay over was wrongful as matter of fact and as matter of law. That the survivor of two administrators is entitled to the custody of the estate would seem to be free from doubt, and that he would be liable to the heirs as for a *devastavit* if he negligently failed to take possession upon the death of his co-administrator, is equally clear. As before stated, however, these conclusions of law, if such they be, did not affect the decree as rendered, and it is wholly immaterial that they are designated findings of fact, because, as findings of fact, they are conclusive upon this court, while, if they are conclusions of law, they are not erroneous.

Eilers vs. Boatman, 111 U. S. 356.

Young's Appeal, 99 Pa. St. 84.

Whiddon vs. Williams, 24 S. E. Rep. 437.

VIII.

The allowance of the solicitor's fee was within the discretion of the court.

The fifteenth assignment of error is as follows:

> 15. The court erred in finding that the defendant was liable to the complainant for the value of solicitor's fees, at the time of the rendition of the decree therein, in the sum of three thousand, five hundred and eighty-six dollars. Court's XI finding, folio 373.

The twenty-third assignment of error is as follows:

> 23. The court erred in decreeing in favor of the complainant a solicitor's fee of ten per cent. on the whole amount of the said estate as found by the court.

The eleventh finding of fact is as follows:

> That the value of the services of the solicitors in this cause at the time of the rendition of the final decree herein by this court was the sum of three thousand, five hundred and eighty-six dollars and ninety-seven cents.

The court merely found the value of the solicitor's services and decreed the payment of the amount found, out of the fund—something very different from the thing complained of in these two assignments of error.

The power of a court of equity to allow solicitor's fees out of such a fund as was brought under the court's jurisdiction in this proceeding is undoubted, and this court will not look behind this finding of fact, to determine that the allowance was unreasonable. If, however, this court will examine the question of the reasonableness of this allowance the record will show that it is less than it should have been rather than unreasonably large. The district court allowed $5,000 to complainant for his solicitor's fees, and this amount was reduced by the supreme court to $3,586.97. The record shows that this litigation had, at the time of the allowance extended over a period of seven years, and that the defendant had resorted to every device which ingenuity could suggest to prevent the distribution of the estate and that the litigation was of the most vexatious character.

The appellant should have been required to pay this solicitor's fee, and this is one of the errors assigned on the cross-appeal, but the power of the court to make this fee a a charge upon the fund is beyond controversy.

Trustees v. Greenough, 105 U. S. 532.

Fowler vs. Equitable Trust Co., 141 U. S. 415.

Dodge vs. Tulleys, 144 U. S. 457.

Ex-parte Plitt, 2 Wall. Jr. 453.

IX.

The commissions allowed conform to the provisions of the statutes of New Mexico in force when the decree was rendered.

The seventeenth assignment of error is as follows:

17. The court erred in finding that the complainant was entitled to his full statutory commission on the whole of said last mentioned sum. XIV finding, folio 373.

The twenty-fourth assignment of error is as follows:

24. The court erred in decreeing in favor of the complainant the full statutory commission allowed to administrators for the settlement of estates, upon the whole amount of said estate as found by it. Folios 364-5.

The fourteenth finding of fact is as follows:

That Pedro Perea, as surviving administrator, is entitled to the statutory commission upon the said sum of thirty-five thousand eight hundred and sixty-nine dollars and seventy-seven cents, which on the date of said decree amounted to the sum of nineteen hundred and forty-three dollars and forty-eight cents; that Guadalupe Perea de Harrison never claimed to act as administrator of said Jose Leandro Perea, Segundo, and no claim was ever made in this or any other proceeding by her or on her behalf for any compensation or commission as such administratrix.

The statute of New Mexico (*Sec. 2 of Chap.* LIV *of Laws of 1891*) is as follows:

Sec. 2. Administrators and executors shall be entitled to a commission upon the amount of money, or property at the appraised value, which comes into their hands as such, of ten per cent. on the first three thousand dollars, and five per cent. on all amounts above the first three thousand dollars.

The fact that the decree in this case distributes the fund furnishes no reason for withholding from the administrator his statutory commission as fixed by law. If he failed to take steps to rescue this fund after the death of his co-administrator and the fund had thereby been lost, he would have been liable as for a *devastavit*. As he was the sole administrator at the time of this decree, and as his co-administrator during her life never claimed to act as administrator, and no claim to commission was ever made in her behalf, complainant was entitled to the full commission, and the court had no discretion to withhold any part of the commission as fixed by the statute.

The supreme court of the territory said in its opinion:

As to the claim that Mrs. Harrison is entitled to share these commissions, it is sufficient to say that both she, in her lifetime, and the defendant, Harrison, then and after her death always insisted that she never held the funds as administratrix, and denied participation in their control as co-administrator for said reason, and no claim for such commissions was ever made until after the case came into this court. It is therefore too late to assert the same, even if it were well founded.

An examination of the record will show that no such claim was made, and that is a sufficient reason for its disallowance.

Lloyd v. Preston, 146 U. S. 630.

San Pedro Co. v. U. S., 146 U. S. 120.

Daking v. Demming, 7 Paige Ch. 101.

Cairns v. Chaubert, 9 Paige Ch. 160.

Matter of De Peyster, 4 Sanf. Ch. 548.

X.

The court properly distributed the assets found to exist in this suit and left the appel-

lant to his other suit to develop the existence of other assets.

The twenty-fifth assignment of error is as follows:

> 25. The court erred in rendering any final decree whatever in said cause, when it clearly appeared that there had not been any complete accounting and settlement of said estate, but should have reversed and remanded the cause to the district court in order that there might be such full and final settlement and accounting.

The fifth finding of fact is as follows:

> That immediately after the intermarriage of the defendant, George W. Harrison, and the said Guadalupe Perea, the said George W. Harrison took charge and control of the affairs of the said Guadalupe Perea, including the assets of the said minor, Jose L. Perea; that he reduced the assets and property of said minor to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of final decree in the case in the district court he retained subject to his individual control all of the moneys belonging to the estate of Jose Leandro Perea, Segundo.

The sixth finding of fact is as follows:

> That Jose Leandro Perea, Segundo, died on the 25th day of August, 1887, being then a minor about eight years of age, and that at the time of the death of said minor he owed no debts, and there were no charges against his estate except funeral expenses and the expenses of his last illness and certain claims for his maintenance by his said guardian.

The record shows that between the death of this child, on the 25th day of August, 1887, and the entry of the decree of the supreme court of the territory on the 26th day of August, 1895, a period of eight years, the appellant had constantly obstructed the settlement of this estate and prevented a distribution, made false

reports to the probate court and false claims as to the grounds upon which settlement was obstructed, and it is insisted by him that the court should lend its aid to this obstruction by allowing him to retain this large sum of money, to the possession of which he has not the shadow of right, until the transactions of the marriage community of the elder Perea and his first wife, beginning in 1842, may be examined, and the accounts of the administrators of the elder Perea may be surcharged and falsified, and until the decree of the probate court settling those accounts is held to have been fraudulently obtained, although all of these things may be done as well after the distribution of this fund as before, if the facts are as claimed by the appellant. It is well settled that a final settlement of an administrator's accounts does not preclude inquiry as to assets of the estate in the hands of the administrator and not embraced in the accounts as settled, or assets which may have come to his hands after such settlement. It is conclusive only as to such matters as were actually passed upon by the court.

Flanders v. Lam. 54 *N. H.* 392.

Clark, admr., v. Clay, 31 *N. H.* 393.

Field v. Hitchcock, 14 *Pick.* 405.

McAfee v. Phillips, 25 *Ohio St.* 374.

XI.

Damages should be assessed against this appellant, as upon a vexatious appeal.

Under the rules of this court and the statutes of the Territory of New Mexico, the decree in this case bears interest at the rate of six per cent. per annum only, while the conventional rate in that Territory is twelve per cent.

Sec. 1735. Judgments and decrees for the payment of money shall draw the same rate of interest with the contract on which they are rendered; and such rate if other than six per cent., shall be expressed in the judgment or decree, but no judgment or decree shall draw more than twelve per cent. interest.

Compiled Laws 1884, Section 1735.

Unless this court shall upon the cross-appeal of this appellee direct the modification of the decree of the supreme court of the Territory, the only relief he can have against what he contends to be a most indefensible delay, is the award of damages not exceeding ten per cent. upon the amount of the decree, if in the opinion of the court this appeal was taken for delay merely. I am aware that this court will apply this rule only when upon the face of the proceedings there does not appear to have been probable cause for the appeal; but it should be applied in this case, if the sixteenth finding of fact is true, and by that finding this court is concluded if it is a material finding. That finding is as follows:

> That George W. Harrison wilfully obstructed the distribution of the assets of the estate of Jose Leandro Perea, Segundo, and by his misconduct rendered it necessary that the complainant should obtain possession of the said assets by the institution of this suit, and that the necessity for this suit arose entirely out of the wrongful conduct of the said George W. Harrison.

A case is certainly made for the assessment of damages under the rule and the statute in pursuance of which the rule was made.

In the case of *Amory v. Amory*, *91 U. S. 357* Chief Justice Waite, delivering the opinion of this court, said:

We can adjudge damages, under Sec. 1010, Rev. Stat. and rule 23, in all cases where it appears that a

writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time.

Attention is called to the following cases in which damages have been allowed by this court upon affirmance:

Palmer v. Arthur, 131 U. S. 60.

T. & P. R'y. Co. v. Volk, 151 U. S. 73.

Gregory, etc., Min. Co. v. Starr, 141 U. S. 224.

Wilson v. Everett, 139 U. S. 616.

Respectfully submitted,

NEILL B. FIELD,

Counsel for Appellee.